STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NORIS ROBERT LINDSEY,

Defendant-Appellant.

UNPUBLISHED
October 14, 2003

No. 240590
Calhoun Circuit Court
LC No. 01-001854-FH

Before: Whitbeck, C.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial for two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). The trial court sentenced defendant to 85 to 180 months in prison. We affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the prosecutor improperly elicited testimony regarding defendant's incarceration from the morning after the crime until trial. We disagree. We review for abuse of discretion a trial court's decision whether to admit evidence. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). In this case, defendant sent the victim several remorse letters from jail during his custodial bindover. When defendant challenged the letters' authenticity, the prosecutor properly introduced evidence that they came from the jail and bore defendant's signature. Because these facts tended to show that the letters came from defendant, the trial court correctly allowed their introduction into evidence. MRE 901(a).

Next, defendant argues that the prosecutor made improper remarks regarding defendant's credibility and pre-trial incarceration. We disagree. When determining whether a prosecutor deprived a defendant of a fair trial, we analyze de novo the prosecutor's comments and evaluate them in light of defense arguments, the evidence presented, and the general context. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor need not argue the least prejudicial evidence or state inferences in the blandest terms, *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), but rather may vigorously and candidly argue that a testifying defendant lacks veracity. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

In this case, the prosecutor insinuated that defendant concocted his story during the delay between the date of the crime and the day he testified. Defendant argues that this insinuation,

added to the knowledge of defendant's incarceration, improperly influenced the jury and denied him a fair trial. But defendant, not the prosecutor, revealed details about his incarceration in his own testimony, including how long he spent in jail before trial. Because he dwelt on his incarcerated status in his own testimony, we attribute to defendant the negative image that he perpetually ruminated about his case in jail. The prosecutor merely emphasized that the long delay allowed defendant ample time to fabricate his version of events. Because the prosecutor's comments permissibly related to defendant's credibility and not his incarceration, defendant's argument fails. *Id.*

Finally, defendant argues that the trial court erred when it failed to instruct the jury regarding the potential lesser included offense of CSC IV (MCL 750.520e). We disagree. We review for abuse of discretion a trial court's determination whether an instruction applies to the facts of a particular case. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). A trial court need only instruct a jury about necessarily included lesser offenses supported by the evidence, and may not instruct the jury on cognate lesser offenses. *People v Cornell*, 466 Mich 335, 337, 339; 646 NW2d 127 (2002). In *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997), our Supreme Court determined that CSC II (MCL 750.520c) was only a cognate lesser offense of CSC I (MCL 750.520b), because, according to the definitions in MCL 750.520a, CSC II required contact for a sexual purpose, and CSC I only required penetration. *Lemons, supra* at 253-254. The same difference in the definition of "sexual contact" and "sexual penetration" that rendered CSC II a cognate lesser included offense of CSC I distinguishes CSC IV from CSC III. Because the same definitions apply with the same effect, *Lemons* requires us to find that CSC IV is a cognate lesser included offense of CSC III. Therefore, the trial court correctly instructed the jury on CSC III alone. *Cornell, supra* at 337.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper